

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**February 8, 2002**

**IN RE:**

**BELLSOUTH TELECOMMUNICATIONS, INC.  
TARIFF TO INTRODUCE 2001 KEY  
BUSINESS DISCOUNT PROGRAM**

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**DOCKET NO.  
01-00461**

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**ORDER APPROVING TARIFF**

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This matter came before the Tennessee Regulatory Authority ("Authority") at the regularly scheduled Authority Conference held on June 26, 2001, for consideration of BellSouth Telecommunications, Inc.'s ("BellSouth") Tariff to Introduce 2001 Key Business Discount Program ("2001 Tariff") filed with the Authority on May 29, 2001. The enrollment period for this program runs from June 26, 2001 through June 25, 2002.

On June 19, 2001, the Southeastern Competitive Carriers' Association ("SECCA") filed a petition to intervene and a petition requesting the Authority to suspend the effective date of BellSouth's 2001 Tariff. In its petitions, SECCA asserted that the 2001 Tariff could be discriminatory and anti-competitive. BellSouth filed its response on June 21, 2001, denying SECCA's allegations and asserting that the Authority should deny both petitions.

At the Authority Conference on June 26, 2001, the Directors permitted counsel for BellSouth and counsel for SECCA to present their respective positions through oral argument. The parties, instead, announced to the Directors that they had reached an agreement whereby

BellSouth would amend the 2001 Tariff to cut the number of wire centers in half and limit the offering to wire centers where BellSouth faces "active, aggressive CLEC competition."<sup>1</sup>

After discussing this matter with the Parties and based upon careful consideration of the 2001 Tariff filing and the existing program, the Authority made the following findings and conclusions:

1. The initial Key Business Discount Program Tariff was approved at the regularly scheduled June 20, 2000 Authority Conference.<sup>2</sup> The current Key Business Discount Program tariff was approved at the November 7, 2000 Authority Conference.<sup>3</sup>
2. The purpose of the 2001 Tariff is to extend and modify BellSouth's Tariff to introduce the Key Business Discount Program originally approved by the Authority in Docket No. 00-00436 and extended by the Authority in Docket No. 00-00903.
3. The 2001 Tariff extends the enrollment period from June 26, 2001 until June 25, 2002, decreases the minimum monthly billed revenue requirement from \$150 to \$100, increases the minimum discount from five percent (5%) to six percent (6%) thereby providing discounts ranging from six percent (6%) to eighteen percent (18%), depending on the contract term and billed revenues, and requires a monthly billing amount in the range of one hundred dollars (\$100) to three thousand dollars (\$3,000) per month. In addition, BellSouth states in the 2001 Tariff that the contracts will be available for resale for the duration of the 2001 Tariff enrollment period.
4. The 2001 Tariff requires business customers to execute an 18-month or 36-month service term contract. The 2001 Tariff offers a fifty percent (50%) hunting discount for the 18-

<sup>1</sup> Transcript of Authority Conference, 31-32 (June 26, 2001).

<sup>2</sup> *Order Approving Tariff*, TRA Docket No. 00-00436, (July 2, 2001, Chairman Malone dissenting).

<sup>3</sup> *Order Approving Tariff*, TRA Docket No. 00-00903 (June 12, 2001, Chairman Malone dissenting).

month service term and seventy-five percent (75%) hunting discount for the 36-month service term.

5. The 2001 Tariff contains two (2) tiers of termination provisions. The first tier relates to the termination of the underlying specific service and is linked to the General Subscriber Services Tariff provision or the Private Line Services Tariff provision applicable to the underlying service. The second tier applies to the termination of the Key Business Discount program. This termination provision requires the customer to pay a termination charge equal to the lesser of the amount of the discounts received during the contract period limited to the previous twelve (12) months and the repayment of the prorated amount of any waived or discounted nonrecurring charges or six percent (6%) of the total contract.

6. During the June 26<sup>th</sup> Authority Conference, BellSouth agreed to amend the termination provisions in the 2001 Tariff to comply with the proposed Contract Service Arrangement ("CSA") Rules adopted by the Authority in Docket No. 00-00702 and approved by the Authority on April 3, 2001.

7. The current program is available to business customers served in Rate Group 4 and Rate Group 5 wire centers. The program as proposed in the 2001 Tariff would be available to business customers served in 59 wire centers as specifically set forth in the 2001 Tariff.<sup>4</sup> These wire centers essentially serve the metropolitan areas of Chattanooga, Knoxville, Memphis, and Nashville. The proposed program would also be available to wire centers in Columbia and Clarksville.

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<sup>4</sup> Fifty-seven (57) of the fifty-nine (59) wire centers are located in Rate Group 4 and Rate Group 5. Nevertheless, the proposed 2001 Tariff, unlike its predecessor tariff, does not include all of the wire centers in Rate Group 4 and Rate Group 5. The Columbia and Clarksville wire centers are located in Rate Group 2 and Rate Group 3, respectively.

8. The 2001 Tariff excludes business customers who have annual statewide billing amounts that exceed thirty-six thousand dollars (\$36,000).

A majority of the Authority determined that a contested case was not warranted relative to the 2001 Tariff, which effectively denied SECCA's *Petition to Intervene* and *Petition to Suspend* the effective date of the 2001 Tariff. The majority further rejected the proposed settlement agreement,<sup>5</sup> and after hearing argument of counsel, determined that the program should be offered to the greatest possible number of business customers. Therefore, the majority approved the 2001 Tariff subject to BellSouth's amendments, which were to make (a) both tiers of termination provisions compliant with the CSA Rules, and (b) to be available to all wire centers in the existing program as well as all wire centers proposed in the 2001 Tariff.

Based on the foregoing findings and conclusions, the Authority determined that the 2001 Tariff, should be amended to include termination provisions reflecting those set forth in the CSA Rules and to be available to qualifying business customers in Rate Groups 4 and 5 and the wire centers of Columbia (Main) and Clarksville (Main). Thereafter, a majority of the Directors voted to approve the 2001 Tariff, as amended.<sup>6</sup>

**IT IS THEREFORE ORDERED THAT:**

1. A contested case is not warranted in this matter.
2. BellSouth Telecommunications, Inc.'s ("BellSouth") Tariff to Introduce 2001 Key Business Discount Program is approved, as amended herein.

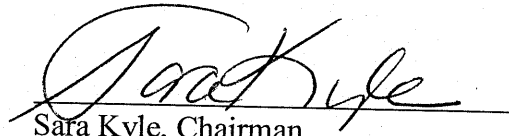
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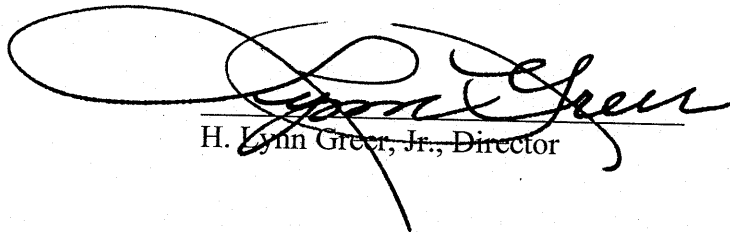
<sup>5</sup> Transcript of Authority Conference, 41 (June 26, 2001).

<sup>6</sup> On June 26, 2001, BellSouth filed the appropriate amendments to the Tariff, they were reviewed by the Authority and determined to be in compliance with these rulings, and, by letter, the Executive Secretary notified BellSouth that the Tariff was in effect as of June 26, 2001.

3. BellSouth Telecommunications, Inc.'s ("BellSouth") Tariff to Introduce 2001 Key Business Discount Program shall be available to Rate Groups 4 and 5 and to the wire centers of Columbia (Main) and Clarksville (Main).

4. The 2001 Tariff termination provisions are amended to reflect the termination liability charges set forth in the proposed CSA rules in Docket No. 00-00702 and adopted by the Authority on April 3, 2001.

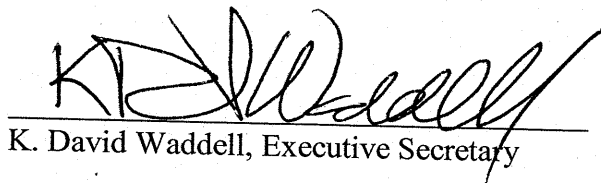
  
Sara Kyle, Chairman

  
H. Lynn Greer, Jr., Director

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Melvin J. Malone, Director

ATTEST:

  
K. David Waddell, Executive Secretary

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\*\*\* Director Malone voted against the 2001 Tariff as approved.

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**DISSENTING OPINION OF DIRECTOR MALONE  
TO THE ORDER APPROVING TARIFF**

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While I respect the decision of my colleagues, it is my reasoned opinion that the majority's decision is infirm for failure to provide equal rate treatment to similarly situated consumers. Therefore, I am compelled to dissent.

The Tariff to Introduce 2001 Key Business Discount Program (the "Tariff"), submitted by BellSouth Telecommunications, Inc. ("BellSouth") on May 29, 2001, proposed to offer a program, with accompanying discounts, to business customers served in fifty-nine wire centers. The Southeastern Competitive Carriers' Association ("SECCA") opposed the Tariff due to "the discriminatory and anti-competitive nature of the proposed tariff."<sup>1</sup> Specifically, SECCA noted that "the tariff offers discounts in some wire centers but not in others. There is no explanation in the tariff for this presumptatively unreasonable discrimination."<sup>2</sup>

As noted in the *Order Approving Tariff*, the parties presented an oral settlement to the Authority at the June 26, 2001, Authority Conference. Under the settlement agreement, SECCA

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<sup>1</sup> SECCA's *Petition to Intervene*, TRA Docket No. 01-00461, p.1 (June 20, 2001).

agreed to withdraw its opposition to the Tariff and BellSouth agreed to amend the Tariff such that it would only apply in areas where there is "active, aggressive CLEC competition."<sup>3</sup> According to the parties, the amendment would reduce, by half, the wire centers targeted by the Tariff as filed.<sup>4</sup>

The Authority initially approved BellSouth's Key Business Discount Program,<sup>5</sup> in large part, because the targeted areas, the metropolitan area calling exchanges (Rate Groups 4 and 5), were deemed to be experiencing a sufficient level of meaningful competitive activity.<sup>6</sup> In the current Tariff filing, BellSouth, in addition to other provisions, sought to extend the discount program to wire centers not currently covered under the existing tariff, absent any demonstration that the extended areas were likewise experiencing a sufficient level of meaningful competition. It is this incongruity, coupled with selective rate treatment, that is central to the Tariff's infirmity.

There is no dispute that Tennessee law forbids, as unjust discrimination, a public utility from offering special rates to any person and withholding the same rates from another who is under substantially like circumstances and conditions.<sup>7</sup> There is likewise no dispute that Tennessee law declares it unlawful for a public utility to make or give an undue or unreasonable preference or advantage to any particular person or locality.<sup>8</sup> Accordingly, the Authority has carefully crafted criteria, in the arena of special rate offerings, that do not run afoul of Tennessee

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<sup>2</sup> *Petition of the Southeastern Competitive Carriers Association*, TRA Docket No. 01-00461, p. 1 (June 20, 2001).

<sup>3</sup> *TRA Conference Transcript*, Docket No. 01-00461, pp. 30-31 (June 26, 2001).

<sup>4</sup> *Id.* at 31.

<sup>5</sup> *See Order Approving Tariff*, TRA Docket No. 00-00436 (July 2, 2001) and *Order Approving Tariff*, TRA Docket No. 00-00903 (June 12, 2001).

<sup>6</sup> *See, e.g., TRA Conference Transcript*, Docket No. 00-00903, p. 35 (Nov. 7, 2000) ("The key point, I believe, is that there are competitive alternatives.") (Comments of Director Greer).

<sup>7</sup> Tenn. Code Ann. § 65-4-122. *See also, e.g., BellSouth Telecommunications, Inc.'s Opposition to SECCA Petition*, TRA Docket No. 01-00461, pp.7-8 (June 21, 2001) (BellSouth acknowledging that Tennessee law "prohibit[s] a utility from offering different rates to similarly situated customers.") (citing *Southern Ry. Co. Pentecost*, 330 S.W.2d 321, 325 (Tenn. 1969)).

<sup>8</sup> Tenn. Code Ann. § 65-4-122.

law and yet recognize the emergence of differing service patterns and challenges from one geographic locale to another. Illustrative of the criteria established in allowing special rates is BellSouth's Special Contracts. Generally, the Authority has not permitted BellSouth to offer long-term, discounted arrangements to select customers without the availability of a demonstrable competitive alternative.<sup>9</sup> Thus, concluding, as the Authority has, that this standard guards against unjust discrimination and unreasonable prejudice or disadvantage, BellSouth would have to demonstrate, in some manner, the presence of a competitive alternative prior to extending its discount program to certain previously uncovered areas. This standard, it appears, served in large measure, if not in whole, as the basis of the settlement announced by the parties.<sup>10</sup>

The terms of the announced settlement would have requested approval of the discount program in competitive areas and withheld the program in non-competitive areas, consistent with previous Authority decisions. Still, the majority rejected the settlement.<sup>11</sup> Instead, the majority approved the Tariff for those wire centers located in Rate Groups 4 and 5, the metropolitan area calling ("MAC") exchanges, and for the wire centers (main) in Columbia and Clarksville. The majority provided no rationale either in their oral deliberations on June 26, 2001, or in the *Order*

<sup>9</sup> See, e.g., *TRA Conference Transcript*, Docket No. 01-00461, pp. 37-38 (June 26, 2001) (Counsel for BellSouth affirming that in seeking approval of their long-term CSAs, BellSouth represented the presence of a competitive alternative to the Authority).

<sup>10</sup> See e.g., *Order Amending and Approving Tariff No. 01-00162, In Re: BellSouth Telecommunications, Inc. Tariff to Introduce Primary Rate Voice/Data ISDA Promotion*, TRA Docket No. 01-00162, p. 2 (Feb. 4, 2002) ("At the Authority Conference on March 20, 2001, counsel for BellSouth explained that the Tariff is intended to be a response to competition in areas where the customer has a competitive alternative and that it is not BellSouth's intent to make the promotion available if the customer does not acknowledge such or if, in fact, there is no competitive alternatives. . . . According to BellSouth, any similarly situated customer could avail itself of this Tariff and these additional discounts"). See also *TRA Conference Transcript*, TRA Docket No. 01-00461, p. 34 (June 26, 2001) ("What we don't want is discriminatory discounts that lock up potential businesses before competition has arrived. I think that the process that we've worked out with BellSouth will prevent that from happening.") (Counsel for SECCA).

<sup>11</sup> BellSouth declined to voluntarily offer the discount program at issue statewide. *TRA Conference Transcript*, Docket No. 01-00461, p. 34 (June 26, 2001).



*Approving Tariff* justifying, or otherwise explaining, the inclusion of Columbia and Clarksville and the exclusion of other similarly situated wire centers.

With the exception of Rate Groups 4 and 5, Authority records indicate that as of June 26, 2001, other wire centers in Tennessee had reached a level of competitive activity similar to, and in some instances greater than, the level of competitive activity existing in Columbia and Clarksville. Nonetheless, the majority, without explanation, excluded such areas from the discount program. The action taken by the majority here is contradictory to, and irreconcilable with, the action recently taken by the agency in *Order Amending and Approving Tariff No. 01-00162, In Re: BellSouth Telecommunications, Inc. Tariff to Introduce Primary Rate Voice/Data ISDA Promotion*, TRA Docket No. 01-00162, p.2 (Feb. 4, 2002) (agency amended proposed tariff offering discount to alleviate concern that the tariff as proposed "could result in discrimination in pricing among similarly situated customers.").

In the *Order Approving Tariff*, the majority declared that "the [discount] program should be offered to the greatest possible number of business customers."<sup>12</sup> To the extent that this constituted the majority's objective, then logic, properly applied, would have dictated that areas similarly situated to Columbia and Clarksville be afforded the benefit of rate discounts as well, consistent with state law.

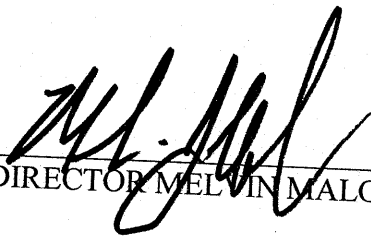
The grafting of Columbia and Clarksville into the areas in which the discount program is applicable is not the decision from which I dissent. The majority decision from which this dissent arises is the exclusion from rate discounts those wire centers that are similarly situated to those that received the discounts. I am fully persuaded that similarly situated subscribers should

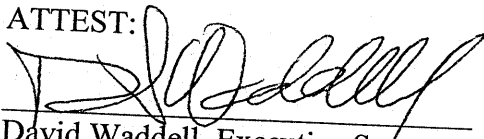
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<sup>12</sup> *Order Approving Tariff*, TRA Docket No. 01-00461, p. 4 (Feb. 2001).

be treated equally, without unjust discrimination or preference, and that state law mandates the same.

For the foregoing reasons, I respectfully dissent.

  
DIRECTOR MELVIN MALONE

ATTEST:   
David Waddell, Executive Secretary